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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ERIC ERRICKSON, Defendant and Appellant.	A130855 (City and County of San Francisco Super. Ct. No. 2396404)

Defendant Eric Errickson appeals from a judgment of conviction, entered after he pled guilty as part of a negotiated disposition, of one count each of lewd and lascivious acts on a child under the age of 14, possession and control of child pornography, and domestic violence against his girlfriend and co-habitant, A.T. Defendant argues the trial court violated his Fourth Amendment right against unreasonable search and seizure when it denied his motion to suppress certain evidence obtained from a protective sweep of his apartment by police, as well as from their warrantless search of his apartment and seizure of his computers. He also argues the trial court misadvised him about the length of his parole period and acted beyond its legal authority when it ordered that his parole period was limited to four years, requiring that we order the trial court to allow him to withdraw his guilty plea if he so moves on remand.

We conclude the trial court properly denied defendant's motion to suppress. We also conclude the trial court issued an improper order limiting defendant's term of parole, but it is premature to rule on defendant's right to withdraw his guilty plea in absence of a motion to withdraw below. Therefore, we affirm the judgment, except that we vacate

defendant's sentencing and remand the matter to the trial court for further proceedings consistent with this opinion.

BACKGROUND

On November 30, 2008, San Francisco police were notified by A.T. that defendant had inappropriately touched her seven-year-old daughter in the early hours of that morning and subsequently assaulted A.T., both incidents occurring in the apartment A.T. and defendant lived in together in San Francisco. A.T. also told police that she had seen defendant viewing what she thought was child pornography on computers in the apartment. Police arrested defendant and, with A.T.'s consent, seized three computers from the apartment that belonged to him.

In April 2009, the District Attorney for the City and County of San Francisco charged defendant by information with seven felony violations of Penal Code section 288, subdivision (a), involving lewd and lascivious acts upon a child under 14 years of age with enhancement allegations, and one count of violating Penal Code section 273.5, subdivision (a), involving infliction of corporal injury resulting in a traumatic condition on a cohabitant.

Defendant moved to suppress evidence resulting from the protective sweep of his apartment, and the subsequent search of his apartment and seizure of his computers. He sought to suppress any observations by the officers and any evidence obtained from the computers seized. His motion was denied in June 2009.

In July 2010, the district attorney charged defendant by information in a separate case with two counts of possession and control of a photograph of child pornography, in violation of Penal Code section 311.11, subdivision (a).

In October 2010, the corporal injury charge was amended from a felony to a misdemeanor and the two informations were consolidated. Pursuant to a negotiated disposition, defendant pled guilty to one felony count of lewd and lascivious acts upon a child under 14 years of age, one felony count of possession of child pornography, and one count of misdemeanor infliction of corporal injury on a cohabitant. The remaining charges were dismissed. There was no written plea agreement. Before defendant

changed his plea in October 2010, his own counsel admonished him at the court's request, which admonishment included the statement that he "may" be placed on probation for a period of four years.

At the subsequent sentencing hearing, pursuant to the plea agreement, defendant was sentenced to a total of eight years and eight months in state prison and a concurrent one-year term in county jail, and ordered to pay various fines and fees. The court continued the hearing to be sure that defendant was properly advised about his parole period. At the continued hearing the parties and the court discussed a recent change in Penal Code section 3000, which appeared to set parole for persons in defendant's circumstances at a maximum of 10 years. Defense counsel asked for a continuance because defendant was seriously considering withdrawing his plea, based on this parole misadvisement and an unanticipated restitution award to A.T. After an extended discussion, the court, at the prosecution's urging, ordered that defendant's parole be limited to four years, over defendant's objection that it did not have the legal authority to do so.

Defendant filed a timely notice of appeal, with a certificate of probable cause. By order filed on May 6, 2011, we granted defendant's motion to construe his notice of appeal in case No. 2396404 below to include the judgment in case No. 10001511 below.

DISCUSSION

I. *Defendant's Motion to Suppress Evidence*

Defendant argues that the trial court's denial of his motion to suppress evidence acquired as a result of the warrantless search of his apartment and removal of his computers violated his right against unreasonable search and seizure pursuant to the Fourth Amendment of the United States Constitution. We disagree.

A. *The Proceedings Below*

A number of witnesses testified at the hearing on defendant's suppression motion, brought pursuant to Penal Code section 1538.5. We focus on events as described by three police officers who testified at the hearing because their testimony provides substantial evidence that supports the trial court's rulings.

A.T. was first interviewed by San Francisco Police Officer Michael Lee at a Berkeley residence on the day of the incident. According to Lee's testimony at the suppression hearing, A.T. said she had found defendant, her boyfriend, in the middle of the night in bed with her two young children, in close proximity to her seven-year-old daughter, M.T., at the apartment she shared with defendant in San Francisco. She and M.T. told Lee that defendant had put his hands down M.T.'s pants and underneath her shirt. A.T. told Lee that she yelled at her children to pack all their belongings and that they were going to leave.

As they started to pack, A.T. said, she had a physical altercation with defendant, who slapped her in the face, punched her multiple times in the head and once in the kidney, dragged her so that some of her hair came off of her head, pushed her in the bathtub area, and shoved her into the bathtub. She and her children grabbed their belongings and left. Lee observed bruising on A.T.'s arms and head. Lee testified that A.T. said she did not believe there were weapons in the apartment.

1. *The Protective Sweep of the San Francisco Apartment*

San Francisco Police Sergeant Marty Lalor and other officers were dispatched to the apartment that same day. Lalor testified that they conducted surveillance there and detained defendant when he came out of the apartment. Building security told the police that a female, probably a prostitute, was in the apartment.

Lee testified that he spoke to Lalor multiple times as he obtained more details from his interviews. Lalor said he was given information by police making him aware that the allegations involved sexual assault of a child and domestic violence and that a gun might be in the apartment.

Given what he knew, Lalor was concerned about officer safety and preserving evidence of a possible crime scene. He testified that he called out from the open front door of the apartment to anyone inside. When no one answered, he entered the apartment and conducted a "protective sweep" that lasted two to three minutes. He observed computers in the living room. He also found a naked woman sleeping in an upstairs loft and what appeared to him, based on his expertise, to be a pipe used to smoke crack

cocaine next to her. After interviewing the woman, he determined she had no information about the crimes being investigated and allowed her to leave the scene.

2. *The Search of the Apartment*

Lee testified that A.T. said she had lived at the San Francisco apartment with defendant for the past two months, received her mail there, and was registered to vote at that address. She and defendant worked in an information technology company and defendant's job involved multiple computer servers in the business, which Lee also told to Lalor. A.T. had noticed defendant viewing pictures of naked females, who she thought were minors, on a computer in the apartment, although defendant had insisted they were images of adults at legal websites. At Lalor's request, Lee asked A.T. to describe the computers in the house, and she told him there were two laptops and two desktop computers in the living room that belonged to defendant, which Lee told Lalor.

When Lee got off the phone the second time with Lalor, he asked A.T., at Lalor's request, for permission to enter her residence in San Francisco in order to determine if it was a crime scene. A.T. gave permission, including a signed permission to search form. Lee then took A.T. and her children to the northern station.

Lalor testified that after the protective sweep, he spoke to defendant, who said he knew they were there because of what had happened that morning, when he was hit in the eye. Defendant said he would go to the police station, but was concerned about locking up his apartment. Lalor told him he would secure the apartment once defendant gave him his keys. Defendant did not express any concerns about the officers being in his apartment. Lalor did not ask for defendant's consent to search the apartment.

Lalor further testified that after defendant was taken away, he, Lalor, received a phone call from Lee, who gave him a better understanding of what had happened and said he had obtained consent from A.T. to enter the apartment and conduct any searches. Lee said A.T. told him that she had been living there for two months with her boyfriend, defendant, and had observed him viewing pictures of young girls on the "home computers that were in the downstairs living area." She had control over the entire unit,

as did defendant, and she had given permission to search. Lalor asked Lee to complete a written permission to search form.

Lalor then called Inspector William Murray of the Juvenile Bureau of the San Francisco Police Department and relayed Lee's information. Murray told him that, based on A.T.'s consent, he should conduct a preliminary search and wait for Murray's response. Lalor said he conducted a search of the apartment, limiting it to one for evidence of the molestation or domestic violence until Murray arrived.

Murray testified that about 3:30 p.m. on November 30, 2008, he spoke to Lee about his interviews and then spoke to Lalor, who was at the crime scene. Lalor had seized the crime scene, and Murray told him to remain there and keep it seized until Murray arrived, when he would take over the investigation. Murray understood Lalor had obtained permission to search the apartment. Lalor told Murray it was a crime involving sexual abuse of a young girl at the location, and that he had detained the suspect. Lalor said he had received information that there was a female in the apartment, and that he had searched the apartment to check on the well-being of the occupants and confirm there was a crime scene.

When Murray arrived at the apartment, Lalor pointed out a handgun found there that appeared to be a semiautomatic, but was in fact a pellet gun. Before arriving, Murray had not spoken to any of the witnesses or alleged victims. Lalor told him that Lee had a signed consent form from one of the apartment residents, A.T. Lalor also told him that defendant was highly skilled in his occupation with computers and that the mother had suspicions and had actually seen images of prepubescent girls on his computer, leading her to believe he was engaged in storing and viewing child pornography on the computer. Murray saw computers in the living room of the apartment.

3. *The Seizure of the Computers*

Murray testified that he went back to Northern Station and conducted videotaped interviews with A.T.'s two children. A.T.'s daughter said defendant had touched her on her breasts, buttocks, and vagina area earlier that day. A.T.'s son said defendant had

touched his penis earlier that year. The children said they played video games with defendant on one of the computers in the living room area of the San Francisco apartment.

Murray indicated he also spoke to A.T., who told him about the incidents. A.T. told him that she and defendant were co-workers, boyfriend and girlfriend, and had moved together from another residence to the San Francisco apartment about two months before. She said the apartment was her residence, and it would be hard for her to continue to live there because of what had occurred.

A.T. also told Murray that about two weeks before, she walked up to defendant, who was on his Acer laptop, and saw images of girls under the ages of 15 or 16. When she asked defendant what he was viewing, he told her the girls were over 18 and that it was a legal website. She had seen pictures at these same types of websites on the Dell computer; she had reviewed the defendant's surfing history when he had left the computer running one time. She had used the computers, as had her son to play video games, and did not tell Murray there were any restrictions on her use or any passwords on the computers. She indicated defendant was highly skilled at working on computers, and had threatened to use them to destroy her if she left him.

A.T. gave Murray permission to enter the apartment, including in writing. Murray believed A.T. had authority to give this consent because she described it as her residence, had a key, and her children also had indicated it was where their mother lived. He did not believe A.T. had moved out of the apartment because the incident had just occurred and she said it was her residence, although he thought, based on her remarks, that she was going to move out in the future.

Murray also believed A.T. had the authority to give consent to search the Acer laptop computer because she had used the computers commonly in the open area of the living room and her son had used the computers. He had the impression that the computers were there for her use, the defendant's, and the children's, and that the computers were not restricted.

At Murray's suggestion, he and A.T. went to the San Francisco apartment. A.T. pointed out the Acer laptop, which Murray found on the computer desk in the living room, the Dell tower, an Apple iPod Touch, and several memory sticks that exclusively belonged to defendant. Murray also testified that when he arrived at the apartment for the very first time, the Dell and Acer computers were turned on, but Murray did not search them. A.T. told Murray the computers belonged exclusively to defendant. Murray seized these computers because A.T. suspected they contained child pornography, listed them on the consent form A.T. had signed, and signed the form again to indicate Murray could not only possess the computers but also search them. Murray indicated to A.T. he would take the computers as evidence. Murray took the Acer laptop and Dell computer back to his office and locked them in a secure area, understanding he had A.T.'s consent to do so.

That next day, December 1, 2008, A.T. told Murray there was another computer, a Hewlett-Packard tower, that she used to watch videos. Over time, she suspected it might possess child pornography because defendant had it for several years. She asked Murray to come to the apartment and pick it up. Murray's partner did so. Murray added the computer to the consent to search form that A.T. had previously signed, but A.T. did not re-sign it.

That same day, Murray turned the Acer laptop on in his office, which had no password protection, and found files of underage girls labeled by age. He opened one folder, noticed "child erotica" in the folders, ran across one pornographic picture involving a young girl, and stopped. He turned the computer off and sat down and started writing a search warrant, which was the protocol for investigating this type of case. He did not go back to any of the computers before securing the search warrant.

In response to the court's questioning about his review of the image on the Acer laptop, Murray said he did so as part of the office protocol to see if there was actual child pornography on the computer. He was trained to then seek a search warrant. Although he thought he had consent to search the Acer from A.T., he stopped "[t]o err on the side of caution" and sought the search warrant. He acknowledged that he had told the

prosecutor that typically the image viewed under this protocol would be inadmissible later when they went to court. A search warrant was subsequently granted.

4. *The Trial Court's Ruling on Defendant's Motion to Suppress*

The trial court ruled that the protective sweep was justified by the circumstances based on officer safety. The court stated that "[o]nce Sergeant Lalor was told that another individual was inside the residence and . . . yelled out and no response, the officer had a right to go in for a very limited purpose . . . to conduct a protective sweep."

Regarding the seizure of the computers, the trial court initially ruled that the computers were properly seized as instruments of crime, in that they were used to view child pornography. As such, they could be seized by police who were legitimately in the area where the computers were located. The court did not address the search of the computers because the issue was not before the court.

After the court announced this ruling on the seizure of the computers, defendant's counsel asked for the opportunity to further review and address certain case law, which the court allowed. At the subsequent hearing, the court heard further argument. The court then stated:

"I made a finding so that you understand what the court's finding was, that the officers had a legitimate—or the facts justify the officers being where they were. They received consent through, I believe, [A.T.]. She had them in the house. They had—the court has already ruled that the protective sweep was legit and their entry in with [A.T.] was based upon their belief of apparent authority, or authority to—that she said . . . '[t]his is—this computer was used to download child pornography.' She said it not once, but twice, and I guess there can be an argument that there was equal access to the computers based upon the testimony. But nevertheless, she did turn over the computers.

"I cited the case, the Ninth Circuit case, for the sole reason now that we are in the 21st century what we perceive as instruments, or even evidence, of crimes has now changed from the simple gun, knife, to now computers can be.

"And once they were there legitimately, and that computer was turned over to them as the instrument of the crime, or evidence of the crime, I believe the officers were justified in taking it."

B. *Analysis*

As defendant acknowledges, "[i]n reviewing the trial court's ruling on the suppression motion, we uphold any factual finding, express or implied, that is supported by substantial evidence, but we independently assess, as a matter of law, whether the challenged search or seizure conforms to constitutional standards of reasonableness." (*People v. Hughes* (2002) 27 Cal.4th 287, 327.)

1. *The Protective Sweep*

Defendant first argues that the police had no right to conduct a protective sweep of his apartment. According to him, "because [defendant] and the alleged victims were no longer in the apartment, and there was no indication that the officers were endangered, the protective sweep was illegal," citing *People v. Celis* (2004) 33 Cal.4th 667 (*Celis*). Defendant does not explain what evidence should have been excluded as a result of this sweep, but his papers below suggest he sought to exclude evidence of the naked woman found sleeping upstairs beside a "crack pipe."

In *Celis*, our Supreme Court explained the general basis for a protective sweep, based on its review of *Maryland v. Buie* (1990) 494 U.S. 325. "A protective sweep of a house for officer safety as described in *Buie*, *does not* require probable cause to believe there is someone posing a danger to the officers in the area to be swept. . . . A protective sweep can be justified merely by a *reasonable suspicion* that the area to be swept harbors a dangerous person." (*Celis*, *supra*, 33 Cal.4th at p. 678.) The *Celis* court acknowledged that some case law upheld the entry of a house for a protective sweep after police had made an arrest outside the house, based on the rationale that " 'in some circumstances, an *arrest* taking place just outside a home may pose an equally serious threat to the arresting officers' as one conducted inside the house." (*Id*. at p. 679.) The court declined to determine if that same rationale applied when police *detained* a suspect outside the residence, because, the court determined, the facts known to the officers in that case fell

short of the reasonable suspicion standard necessary to justify a protective sweep under *Buie*. (*Ibid*.) The court based this conclusion on the fact that the officers had no knowledge of the presence of anyone in defendant's house when they detained him in his backyard, and there was no indication that anyone on the scene was armed. (*Id*. at p. 679.)

The facts in the present case are quite different. Based on the totality of the circumstances, the officers could reasonably suspect the apartment harbored a dangerous person. Lalor testified that he detained defendant because he had engaged in a sexual assault and domestic violence incidents, indicating awareness that defendant could be prone to violence. Although Lalor did not know if weapons were involved in these incidents, he testified that he was told a gun might be in the apartment. Lalor was also told by building security that a female, who was probably a prostitute, was in the apartment; Lalor could reasonably suspect she was capable of criminal conduct. The police were in the hallway of an apartment building rather than outside, making it more difficult for them to get away if they were confronted by a person emerging from the apartment. Finally, given that Lalor knew someone was inside the apartment and these other facts, when he called into the apartment from the front door and received no answer, he had additional good reason to be concerned about officer safety, further justifying what the record indicates was a short and appropriate protective sweep. The court made no error in denying defendant's motion regarding this sweep.

2. *The Search of the Apartment and Seizure of the Computers*

Defendant argues that the police improperly searched his apartment and seized his computers based on consent from A.T. because she did not have actual or apparent authority to grant officers permission to do so, and because "the search exceeded the scope of any consent dealing with the alleged crimes for which the officers were seeking evidence." Both arguments lack merit. The trial court's final denial of defendant's motion to suppress indicates it found both that the police acted properly based on consent from A.T., and that the computer was reasonably suspected to be an "instrument of

crime," the crime being defendant's possession and control of child pornography.[1] We conclude the police acted properly on A.T.'s consent and, therefore, have no need to, and do not, address the "instrument of crime" question.

As the People point out, " 'An otherwise unreasonable search is legal if it is conducted pursuant to free and voluntary consent.' " (*People v. Smith* (2010) 190 Cal.App.4th 572, 577.) Consent can be given not only by the person whose property is searched, but also by a third party who " 'possesses common authority over the premises.' " (*In re D.C.* (2010) 188 Cal.App.4th 978, 983.)

"In some circumstances, however, the consent to a search given by a person with authority to consent to a search of the premises does not necessarily supply consent to search personal property found within the premises. . . . 'Consent to search a container or a place is effective only when given by one with "common authority over or other sufficient relationship to the premises or effects sought to be inspected." [Citation.] "Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes . . . ." ' " (*People v. Jenkins* (2000) 22 Cal.4th 900, 973-974.) Our Supreme Court has explained, "The 'common authority' theory of consent rests 'on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.' " (*People v. Woods* (1999) 21 Cal.4th 668, 676, quoting *People v. Matlock* (1974) 415 U.S. 164, 171, fn.7.)

When a third party provides consent, "the state may carry its burden by demonstrating that it was objectively reasonable for the searching officer to believe that the person giving consent had the authority to do so, and to believe that the scope of the

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[1] The court appears to have based its ruling on both findings, although its statement at the hearing is not completely clear. In any event, "[w]e affirm the trial court's ruling if correct under any legal theory." (*People v. Hua* (2008) 158 Cal.App.4th 1027, 1033 [regarding a court's ruling on a motion to suppress].)

consent given encompassed the item searched." (*People v. Jenkins, supra,* 22 Cal.4th at p. 974.)

We conclude substantial evidence supports the conclusion that it was objectively reasonable for the police to believe that A.T. had the authority to allow the search of the San Francisco apartment and seizure of the computers, based on the information she provided to them at the time and their own observations.

Regarding the apartment, A.T. told police she and defendant had moved to the apartment together, that she lived there, and that she received her mail and was registered to vote at that address. Murray understood she had a key to the apartment. A.T. testified that she told police that she was not on the lease to the apartment in San Francisco, but defendant fails to explain why that was of any significance to our inquiry in light of the multiple facts A.T. told police that indicated she was a co-habitant of the San Francisco apartment with defendant, without restriction.

Regarding the computers, A.T. told Lee that she and defendant worked for an information technology company, and that defendant's job involved multiple computer servers in the business. She said there were computers belonging to defendant in the living room. Formal ownership, however, is not the ultimate issue; as we have explained, it is joint access and control for most purposes. (*People v. Woods*, *supra*, 21 Cal.4th at p. 676; see also *Trulock v. Freeh* (4th Cir. 2001) 275 F.3d 391, 403 (*Trulock*) ["[a]uthority to consent originates not from a mere property interest, but instead from 'mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that others have assumed the risk that one of their number might permit the common area to be searched' "].)

Murray could reasonably conclude A.T. had such joint control and access. A.T. told Murray that she used the computers commonly in the open area of the living room and that her son used the computers as well. A.T. also told Murray she had seen pictures of underage girls on the Dell computer, and reviewed defendant's web history when she accessed a turned-on computer, further suggesting she had unrestricted access and control

of it for most purposes. Murray also said he had the impression that the computers were in the living room for A.T.'s use, and was not told of any restrictions on A.T.'s use of them. When he arrived at the apartment for the very first time, the Acer and Dell computers were turned on. Murray further testified that A.T. told him the computers belonged exclusively to defendant, but, again, that is not the central point of the inquiry. Given A.T.'s statements and these circumstances, Murray had no reason to believe the computers were password-protected or that A.T.'s access to, and use of, them was in any way restricted.

Defendant argues that A.T. did not have actual authority over the San Francisco apartment or the computers based largely on her testimony at the suppression hearing. Among other things, she testified that she was aware that she was not authorized to reside in the apartment without letting the building management know, which she did not do until the day after defendant's arrest; she did not keep any computer files on defendant's computers because it upset him; defendant kept his Acer laptop password-protected and that she could never get into it; defendant sometimes password-protected the Dell computer, usually when he went away, and although he gave her passwords sometimes, they did not work; and her children used the Dell computer while being monitored by defendant.

Defendant does not explain why A.T.'s lack of authority from building management to reside in the apartment matters in our analysis. In any event, there is nothing in the record to indicate that the police were aware of these matters. Based on A.T.'s affirmative representations to them, the police could objectively and reasonably believe she had authority to allow a search of the apartment.

Similarly, while A.T.'s hearing testimony is such that it could be problematic to conclude that A.T. had actual authority over the computers, we need not decide this issue because the record does not indicate the police knew any of these facts when they seized the computers. In light of A.T.'s affirmative representations to the police and the observable circumstances that we have discussed, we conclude the police could

objectively and reasonably believe that A.T. had the authority to consent to the police seizure of the computers.

Defendant's arguments that the search and seizure exceeded the scope of any consent dealing with the alleged crimes for which the officers were seeking evidence are similarly unpersuasive. He first argues the police investigation was focused on just the sexual assault and domestic violence incidents. However, the trial court's ruling indicates it plainly found otherwise and substantial evidence supports this conclusion. The record indicates that A.T. told Lee early in the interview process that she thought she had seen defendant viewing images of naked underage females on the computer. From that moment on, the record indicates that the police pursued these allegations as part of their investigation. Lee testified that he told Murray about these allegations. Murray testified that A.T. discussed these and other similar observations.

Defendant next claims that Murray's testimony indicates he knew that he had exceeded the limits of any possible consent, based largely on Murray's viewing of a single picture of child pornography on the Acer laptop the day after it was seized and stopping to obtain a search warrant. Defendant also contends that Murray, when he testified at the suppression hearing, "told two different stories concerning what [A.T.] told him" because, on the one hand, she said the Acer laptop and Dell belonged exclusively to defendant and, on the other hand, Murray claimed she told him during an unrecorded interview that she was allowed to use the laptop, said nothing to him about passwords, and told him she had reviewed defendant's web browsing history on the Dell computer. Defendant builds on these contentions to argue that Murray "knew that he had no authority to examine the computer files prior to obtaining a search warrant." Defendant suggests that Murray felt compelled to find evidence of child pornography directly because he knew he would not be able to obtain a search warrant based on A.T.'s consent, since she lacked authority to allow him to seize the computers.

Defendant's contentions in effect ask that we reweigh the evidence, in contradiction to the trial court's finding that A.T. legitimately gave consent to the officers to search the apartment, identified the computers that defendant used to download child

pornography, and that "she did turn over the computers." While the court acknowledged that there could be "an argument that there was equal access to the computers, based upon the testimony," as we have discussed, the record makes clear that most of what the defense relied on to argue lack of authority was not known to police at the time of the search and seizure. The court's statement indicates it found the police acted legitimately based on the consent given by A.T., who had apparent authority to turn over the computers. This conclusion is supported by substantial evidence.

Defendant cites as support for his argument the circumstances found in *Trulock, supra,* 275 F.3d 391. As the same *Trulock* court later summarized, in considering whether FBI agents were entitled to qualified immunity in an action alleging a violation of Fourth Amendment rights, the court "held that a co-resident of a home and co-user of a computer, who did not know the necessary password for her co-user's password-protected files, lacked the authority to consent to a warrantless search of those files." (*United States v. Buckner* (4th Cir. 2007) 473 F.3d 551, 554 (*Buckner*).) The case is not persuasive here, however, because, as the court pointed out in *Buckner*, the officers in *Trulock* "were explicitly told that the computer contained password-protected files to which the consenting party did not have access." (*Buckner,* at p. 555.)

Indeed, *Buckner* provides support for our conclusion that the police could reasonably conclude A.T. had the authority to consent to search of the San Francisco apartment and seizure of the computers. In *Buckner*, defendant's wife voluntarily consented to a search of password-protected files, based on "the *totality* of the circumstances known to the officers at the time of the search." (*Buckner*, *supra*, 473 F.3d at p. 555.) These included that the computer was located in the common living area of the marital home, the officers did not have any indication from the wife or attendant circumstances that any files were password-protected, that the computer was on and the screen lit although defendant was not present, that they were told fraudulent activity had been conducted on the computer in the wife's name, and that the computer was leased in the wife's name and could be returned by her to the rental agency without defendant's knowledge and consent. (*Ibid*.) The court held that the officers acted pursuant to the

reasonable belief that the wife had authority to consent to the contested search under these circumstances, rejecting the argument that the officers should have known she did not have common authority because she told them she was not computer-savvy and only used the computer to play games. (*Id*. at pp. 554-555.)

Defendant points out that a number of these circumstances are different and more compelling than those in the present case. However, many of the circumstances cited by him to distinguish *Buckner* from the present case, such as, that A.T. did not inform building management that she lived there, did not access the computers when they were password-protected, did not store files on the computers, and had her children using the Dell computer only when defendant was present and monitoring them, were established at the suppression hearing, rather than told to the officers at the time of the search and seizure. The *Buckner* court's emphasis on an analysis based on the totality of the circumstances known to the officers at the time, as well as its reference to the location of the computer in the common living area, along with Murray's observation that the computers were turned on and his lack of knowledge about any password protection, support the conclusion in this case that the officers acted appropriately.

In short, the trial court's finding that the officers acted properly based on A.T.'s consent is supported by substantial evidence, including Murray's testimony. Contrary to defendant's assertion, that Murray testified both that the computers belonged exclusively to defendant and that he understood A.T. was allowed to use them is not a contradiction. We are troubled, as was the trial court, by Murray's testimony that he searched the Acer laptop for an image of child pornography pursuant to department protocol and stopped after viewing one image to obtain a search warrant in order to err on the side of caution on the one hand, and nonetheless thought the image would be excluded from evidence as a result of his actions on the other. However, these actions occurred after the seizure of the computers, which was the issue before the trial court. The court found this seizure to be proper, based both on A.T.'s consent and because the computers were instruments of crime. Based on a substantial evidence standard of review regarding the trial court's findings and an independent review of the law of search and seizure, we see no reason to

disturb the trial court's denial of defendant's motion regarding the search of his apartment and seizure of his computers based on A.T.'s consent.

II. *The Misadvisement Regarding Defendant's Parole Period*

Defendant also argues that, after he was misadvised when he entered his guilty plea that he would receive four years parole, the trial court improperly ordered that his parole period be limited to four years, which was in excess of its legal authority. Defendant argues that, because this four-year parole period purportedly was an integral part of the plea agreement, we must vacate his sentencing and remand this matter to the trial court with instructions that he be allowed to withdraw his plea "if" he so moves on remand. Defendant and the People raise a number of issues that we have carefully considered, as we now explain.

A. *The Proceedings Below*

On October 6, 2010, defendant changed his plea to guilty to certain charges against him. His own counsel admonished him at the court's request. In doing so, his counsel stated that defendant "may" be placed on parole for a period of four years. Neither the prosecution nor the court disagreed.

At the subsequent sentencing hearing, presided over by a different judge, defendant objected to paying restitution to A.T. as part of his misdemeanor conviction. He told the trial court he would have "never pled had I known there was any restitution." The court indicated it would determine the restitution to A.T. at a separate hearing.

The court then indicated it was sentencing defendant to the stipulated term, that being the aggravated term of eight years for the lewd and lascivious acts, the mid-term of eight months for the possession of child pornography, and a concurrent one year term in county jail for the misdemeanor domestic violence count. The court granted defendant a total of 850 days in custody and conduct credits, and ordered him to pay certain fines and fees.

The court did not complete the sentencing hearing at that time, however. Instead, it continued the hearing because, it stated, it wanted to review Penal Code section 3000 to

make sure defendant was properly advised about his potential parole period, given a recent amendment of the statute.

At the continued hearing, defendant's counsel took the position that Penal Code section 3000, as amended prior to defendant's sentencing, now required parole "not exceeding 10 years" for his offense, rather than the four years defendant was advised, and that this "misadvisement" was a violation of the terms and conditions of the plea agreement. Defendant's counsel stated that defendant, based on this possibly longer parole period and a restitution amount of $5,500, was "very seriously contemplating a motion to withdraw his plea."

When the court asked why a misdavisement about parole would be a basis for defendant withdrawing his plea, his counsel stated:

"The reason why it is a basis to withdraw the plea is because it's a different scenario. He has not yet been sentenced. It is a requirement for the court to advise somebody on the terms and conditions of the sentence. And if you fail to advise, its error. But those cases that I've looked at say it is kind of harmless error because it would have happened anyway.

"But here we are in a position to stop that from happening. Here we are on the record telling the court, we are not accepting 10 years of parole. We don't accept that as a term and condition. And we are in a position now since we know that that's likely the scenario to say we object. Those other cases people didn't have the opportunity to object.

"So the court at this time has to say, well, and has the opportunity to say, does [defendant] voluntarily and knowingly accept the terms and conditions? We're saying no. And you know that. And we have a good basis to say no, because four years of maximum parole to 10 years is a very significant change in what he agreed to."

The prosecution responded by stating that, "[s]hould there be any issue or any doubts whatsoever in the court's mind about legality of the sentencing based on these concerns, the People would stick to our plea agreement, and I have been authorized to do so, if that is the case. And I would inform parole of this plea agreement which we feel to be binding." The prosecution noted that the 10-year parole period stated in the amended

Penal Code section 3000 was the maximum parole period. Therefore, the prosecution argued, nothing prevented the trial court from ordering that defendant's parole period was limited to four years, since "any negotiated plea would be mandated upon sentencing, and we would be prepared to inform the prison, parole, et cetera, as to what the plea agreement is." Defense counsel objected that neither the trial court nor the prosecution could enforce a limitation on parole or tell the parole board to violate Penal Code section 3000.

The court concluded it could order that defendant should serve a maximum of four years on parole under the terms of the statute. The court stated, "I am going to adopt the People's point of view so that [defendant] has something in the record that shows this court's intention as is the People's intention is to give him the benefit of the bargain that was negotiated previously, and that because the language of the statute says 'up to 10 years,' I don't see it prohibiting the court from entering that sort of order." The court then stated: "At the expiration of your period of incarceration you will be placed on parole for a period not to exceed 48 months unless waived for good cause by the board of prison terms. You[r] parole may be revoked and you could be incarcerated a period not to exceed 12 months in each instance of revocation. The total time spent in custody due to revocation of parole and limit of parole itself may not exceed 48 months."

Near the end of the hearing, defendant's counsel objected to the hearing on the ground that defendant had previously agreed to be sentenced by another judge as long as the sentence was the same as that announced at the time. Moments before the conclusion of the hearing, defendant stated, "I'd just like it on the record that I think this is a complete different sentence than what I pled to, and I would like to withdraw the plea." The court responded, "That's pretty clear that both you and your attorney feel that way. So thank you."

The court's oral ruling at the hearing limiting defendant's parole period was not otherwise memorialized. The minute orders and abstracts of judgment subsequently issued by the court do not refer to it.

B. ***Analysis***

Defendant and the People disagree sharply about the relationship of defendant's parole period to the plea agreement, and the relevant law.

Defendant argues in his opening brief that the trial court initially misadvised him that his parole period would be four years when, as a result of the amendment to Penal Code section 3000, the period was actually 10 years. The court's subsequent order to limit his parole period to four years was beyond its authority and cannot be enforced. Because the four-year parole period was an integral term of the plea agreement, he should be allowed to withdraw his guilty plea without showing prejudice, but the court's error was prejudicial in any event.

The People acknowledge the Board of Parole Hearings has the "sole authority" to set defendant's parole period within statutory limits, implicitly conceding the trial court's order limiting defendant's parole period to four years cannot be enforced. Nonetheless, they argue we should affirm because defendant was merely misadvised that his parole period would be four years. Defendant must show a misadvisement was prejudicial and cannot, in part because his parole period is actually a maximum of five years, the period in effect when he committed the offense, not 10 years, the period in effect when he was sentenced.

We conclude the trial court's order limiting the period of parole to four years was beyond its legal authority. Therefore, we vacate the court's order and sentencing and remand the matter for further proceedings consistent with this opinion. However, in the absence of any withdrawal motion or other trial court determinations appealed from, it is premature for us to make any further determinations. Therefore, we decline to address whether the advisement that his parole period could be four years was merely a misadvisement or an integral part of the plea agreement, or what the proper parole period should be in this case.

1. ***The Initial Advisement***

In *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, our Supreme Court held that a defendant who pleads guilty "shall be advised of the direct consequences of conviction

such as the permissible range of punishment provided by statute . . . ." (*Id*. at p. 605.) In *In re Moser* (1993) 6 Cal.4th 342, it held that this includes advising a defendant regarding mandatory parole consequences. (*Id*. at pp. 351-352.) The court stated "that where the trial court fails to advise a defendant of the mandatory parole consequences of his or her guilty plea or . . . misadvises a defendant as to those consequences, *Bunnell* error has occurred." (*Id*. at p. 352.)

We find no basis in the law or the record for defense counsel's advisement that defendant "may" be placed on parole for a period of four years. If, as the People argue on appeal, defendant's parole period should be set pursuant to Penal Code section 3000 as of the date he committed the relevant offense in November 2008, his parole period should be five years. (Stats. 2007 ch. 579, § 44; Stats. 2009-2010 3d Ex. Sess., ch. 28, § 47.) If, as defendant argued below and suggests in his opening appellate brief, his parole period should be set pursuant to Penal Code section 3000 as of the date of his sentencing, his parole period should be 10 years. (Stats. 2010, ch. 219, § 19.)[2] Furthermore, if the four-year parole period advisement was the result of what the parties thought they could set pursuant to a plea agreement, they were mistaken, as we will discuss.

2. *The Court's Order Limiting Parole*

The trial court's order limiting defendant's parole period cannot be enforced, as the parties implicitly or explicitly acknowledge on appeal. As summarized in *Berman v. Cate* (2010) 187 Cal.App.4th 885 (*Berman*), Penal Code section 3000 "explicitly delegates parole authority to the Board of Parole Hearings (the board). [Citation.] The board has sole authority, within the confines set by the Legislature, to set the length of parole and the conditions thereof. [Citations.] While the commitment offense is one factor the board may consider in determining the length of parole, it must likewise consider a myriad of statutory factors including those that relate to postjudgment conduct, parole plans, and rehabilitation. [Citations.] Thus, permitting the prosecution or court to

[2] In his reply brief, defendant does not contest that he should have been advised that his parole period was five years pursuant to Penal Code section 3000.

negotiate the conditions and/or length of parole would usurp the board's statutory authority and negate any consideration of factors relating to a defendant's postjudgment conduct. In essence, it would ascribe a prescient ability to the court and/or prosecutor to foresee a defendant's suitability for a specific term of parole years or even decades in the future. We cannot believe that either the Legislature or the California Supreme Court intended to condone such a result. As *Renfro* [(2004) 125 Cal.App.4th 223] made clear, courts and prosecutors have limited 'discretion in determining the subject matter of a plea bargain. . . . A plea bargain is limited to "powers legally available to" the court [citation] . . . .' [Citation.] The specific prospective duration of a parole term, even one within the statutory timeframe, is simply not within the discretion or powers legally available to the prosecutor or the trial court." (*Berman*, at pp. 898-899.)

The trial court's order limiting the term of defendant's parole to four years was an act beyond the court's legal authority. Therefore, it must be vacated, as must the court's sentencing order, and the matter remanded for the trial court for further sentencing proceedings so that the court may consider defendant's requests regarding his guilty plea in light of this opinion.

3. *Other Issues Raised by the Parties*

On appeal, the parties debate whether, as defendant contends, the misadvisement about the parole period was an integral part of the bargain, requiring that he be allowed to withdraw his plea regardless of whether the misadvisement was prejudicial, or, as the People contend, it was a mere misadvisement about the law that requires defendant to show prejudice, which defendant has not, and cannot, show in light of the five-year period of parole that, the People argue, actually applies to defendant's case.

It is premature for us to determine this debate prior to remand to the trial court for further proceedings consistent with this opinion. Both parties ignore that they did not actually litigate a motion to withdraw the guilty plea below; rather, defendant merely moved for a continuance so that he could consider *whether* to move to withdraw his plea, which the court implicitly denied when it issued its improper order limiting parole

instead.[3] As a result, we do not have any factual or legal rulings by the trial court to review beyond the court's improper order limiting parole; indeed, defendant's request that we order the trial court to allow him to vacate his plea "if he wishes" on remand indicates he may not even raise the issue on remand.

Most importantly, the trial court did *not* determine whether or not the misadvisement was an integral part of the plea bargain or a mere misstatement of the applicable parole period mandated by law. Presumably, any such ruling would include the trial court's consideration of any evidence timely submitted by the parties, such as declarations made under penalty of perjury, regarding the terms of the plea agreement and whether or not the misadvisement was prejudicial. (See, e.g., *People v. Avila* (1994) 24 Cal.App.4th 1455, 1460 [indicating that defendant's motion to withdraw his guilty plea was accompanied by a declaration].)

Such evidence, and the concomitant factual findings and legal determinations by the trial court, are not in the present record. For example, the parties provide no indication to this court as to why defense counsel, with the prosecution and the trial court implicitly approving, misadvised defendant that he "may be placed on parole for a period of four years from the date of his initial parole." On the one hand, the record of the October 6, 2010 hearing suggests it was merely a misadvisement, since nothing in the reporter's transcript of the hearing or the resulting minute orders indicates a four-year parole period was part of the plea agreement.

On the other hand, at the subsequent sentencing hearing, the prosecutor said the People would inform the parole authorities about the "binding" "plea agreement," that

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[3] Moments before the conclusion of the hearing, defendant stated, "I'd just like it on the record that I think this is a complete different sentence than what I pled to, and I would like to withdraw the plea." This statement was made "for the record" and not as a motion, and did not include any reference to the parole period or the court's order limiting that term. Furthermore, defendant did not state the basis for his desire, which is unclear, particularly since his counsel had stated defendant was also seriously considering withdrawing his plea based on the court's restitution order. For each and all of these reasons, we conclude defendant' statement was not a motion to withdraw his guilty plea based on the misadvisement about the parole period.

"the cure for any mistake made on the part of the prosecution in proffering a plea would be to enforce the plea bargain, and that would be our position at this point," and indicated the People "would be informing the parole board as to what the plea is."

As our discussion has indicated, such a plea agreement would have been a mistake because the Board of Parole Hearings is the sole authority in determining the parole period. More relevant to the present point, these statements by the prosecution were argument made in opposition to defendant's motion for a continuance. There was no evidence submitted or considered by the trial court, or any ruling by the court, regarding whether the initial advisement was a mere misadvisement or an integral part of the plea agreement.[4] In this context, the prosecutor's statements do not conclusively establish that a four-year parole period was an integral part of the actual plea agreement, as defendant urges on appeal. (See *People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1488-1489 [rejecting an argument by the People made in opposition to defendant's motion to withdraw his plea because, while defendant submitted a declaration, the People's opposition "contained no declaration by the prosecutor or other direct evidence" regarding the issue].)

Furthermore, it would be premature for us to determine the applicable period of parole because defendant indicates that, on remand—should he move to withdraw his plea—he will argue the parties agreed to a four-year parole period as an integral part of their plea agreement and, given that this cannot be enforced, he must be allowed to withdraw his plea without showing any prejudice, pursuant to *Berman, supra*, 187 Cal.App.4th at page 893 ["[a] defendant is entitled to relief for a violation of the terms of his plea agreement without a showing of prejudice"].) We offer no opinion regarding this theory. However, we note that, should the trial court determine, after considering all the evidence and argument presented by the parties, that this argument is meritorious, the

[4] Defendant refers to the trial court's statement, made in the course of issuing its order limiting the period of parole, that it was the court's intention "to give him the benefit of the bargain that was negotiated previously." Read in context, this was not a factual finding; rather the court so stated in the course of adopting the People's legal argument that it could issue an order limiting parole.

court would have no reason to determine the proper period of parole, since the issue is relevant only to the issue of prejudice.[5]

DISPOSITION

The judgment is affirmed, except that trial court's sentencing order is vacated, including its order limiting defendant's parole period to four years, and this matter is remanded for further sentencing proceedings consistent with this opinion. The trial court is ordered to reinstate its sentencing order (except for its order limiting defendant's parole period to four years), unless defendant timely moves to withdraw his guilty plea, which motion the trial court shall then consider.

Lambden, J.

We concur:

Kline, P.J.

Richman, J.

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[5] We also express no opinion about the People's argument that no prejudice occurred because defendant is actually subject to the five-year parole period stated in the previous version of Penal Code section 3000, only one year more than what defendant was misadvised. The People's reliance on *In re Thomson* (1980) 104 Cal.App.3d 950 and *In re Bray* (1979) 97 Cal.App.3d 506 suggests the view that the application of Penal Code section 3000, as amended effective September 9, 2010, to defendant, who committed his offenses in November 2008, would be invalid as an ex post facto law. (See *In re Bray*, at p. 518.)

Should the trial court determine the misadvisement was merely a misstatement of law, it would need to determine whether this was prejudicial. (*Berman*, *supra*, 187 Cal.App.4th at p. 897 ["misadvisement . . . is error entitling the defendant to withdraw the plea only where he or she establishes prejudice, i.e., that the defendant would not have pled guilty but for the misadvisement"].) Even then, the difference between a five or 10-year term and a four-year term is not necessarily dispositive of the issue. (See, e.g., *People v. Avila*, *supra*, 24 Cal.App.4th 1455 [rejecting defendant's argument that he was prejudiced by the misadvisement that he was subject to up to three years of parole when he was subject to parole for life].)